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No. 359

In the Supreme Court of the United States

OCTOBER TERM, 1958

MIDWEST MOTOR EXPRESS, INC., PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF FOR THE RESPONDENT IN OPPOSITION

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BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Tax Court (R. 73-102)[1] is reported in 27 T.C. 167. The opinion of the Court of Appeals is reported in 251 F. 2d 405.

JURISDICTION

The judgment of the Court of Appeals (Pet. 41) was entered on January 15, 1958. A timely petition

[1] Record references are to the record filed in the Court of Appeals.

for rehearing was denied on April 16, 1958. (R. 200.) By order of Mr. Justice Whitaker, the time within which to file a petition for a writ of certiorari was extended to and including September 13, 1958. The petition for a writ of certiorari was filed on September 12, 1958. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

QUESTION PRESENTED

Whether the sum received by the taxpayer in 1952 as the result of an award by the Motor Carrier Claims Commission on account of federal control of the taxpayer's transportation system during World War II is gain from the compulsory or involuntary conversion of property within the meaning of Section 117 (j)(2) of the Internal Revenue Code of 1939, or ordinary income under Section 22(a).

STATUTE INVOLVED

Internal Revenue Code of 1939:

SEC. 22. GROSS INCOME.

(a) *General Definition.*—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, secur-

ities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. * * *.

* * * *

(26 U.S.C. 1952 ed., Sec. 22.)

SEC. 117. CAPITAL GAINS AND LOSSES.

* * * *

(j) [As added by Sec. 151(b), Revenue Act of 1942, c. 619, 56 Stat. 798] *Gains and Losses From Involuntary Conversion and From the Sale or Exchange of Certain Property Used in the Trade or Business.*—

(1) *Definition of property used in the trade or business.*—For the purposes of this subsection, the term "property used in the trade or business" means property used in the trade or business, of a character which is subject to the allowance for depreciation provided in section 23 (l), held for more than six months, and real property used in the trade or business, held for more than 6 months, which is not (A) property of a kind which would properly be includible in the inventory of the taxpayer if on hand at the close of the taxable year, or (B) property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business.

(2) *General rule.*—If, during the taxable year, the recognized gains upon sales or exchanges of property used in the trade or business, plus the recognized gains from the compulsory or involuntary conversion (as a result of destruction in whole or in part,

theft or seizure, or an exercise of the power of requisition or condemnation or the threat or imminence thereof) of property used in the trade or business and capital assets held for more than 6 months into other property or money, exceed the recognized losses from such sales, exchanges, and conversions, such gains and losses shall be considered as gains and losses from sales or exchanges of capital assets held for more than 6 months. If such gains do not exceed such losses, such gains and losses shall not be considered as gains and losses from sales or exchanges of capital assets. For the purposes of this paragraph:

(A) [As amended by Sec. 322(c)(3), Revenue Act of 1951, c. 521, 65 Stat. 452] In determining under this paragraph whether gains exceed losses, the gains described therein shall be included only if and to the extent taken into account in computing gross income and the losses described therein shall be included only if and to the extent taken into account in computing net income, except that subsection (d) shall not apply.

(B) Losses upon the destruction, in whole or in part, theft or seizure, or requisition or condemnation of property used in the trade or business or capital assets held for more than 6 months shall be considered losses from a compulsory or involuntary conversion.

(26 U.S.C. 1952 ed., Sec. 117.)

STATEMENT

The facts, as found by the Tax Court (R. 74-91), relating to the issue raised in the present petition, may be summarized as follows: [2]

The taxpayer is a corporation engaged in business as a common carrier of property by motor vehicle in interstate commerce. (R. 74-75.) Its income tax returns were filed on an accrual basis. (R. 74.) In order to prevent a threatened interruption of motor carrier service as the result of a labor disturbance, the President, on August 11, 1944, issued Executive Order No. 9462, under which he took possession and control of certain motor carrier systems, including that of the taxpayer. (R. 52-54, 75.)

The Federal Manager of motor carrier transportation systems and properties (R. 75) assumed his duties on August 11, 1944, and issued an order which provided, *inter alia* (R. 76):

> 1. Until further order, you are hereby directed to resume or continue the operation of your motor carrier transportation system in the usual and ordinary manner and course of business, as a going enterprise, in your present corporate, part-

[2] There was another question passed upon by the Court of Appeals, namely, whether the award by the Motor Carrier Claims Commission accrued in 1952. The abandonment of that issue by the taxpayer may be due to the enactment on September 2, 1958, of the Technical Amendments Act of 1958, P.L. 85-866, 72 Stat. 1606, Section 99 of which, notwithstanding the provisions of Sections 42 and 275 of the Internal Revenue Code of 1939, gives the taxpayer an election to accrue the award as taxable income during the period of federal control, but without payment of interest for any period prior to March 15, 1953.

> nership, individual, or trade name, as the case may be, and by means of the instrumentalities, agents, officers, and employees customarily employed by you, as fully as if possession and control had not been taken and assumed by the United States, subject, however, to the terms of said Executive Order and to all general and special orders, rules, regulations, and directions, which may be issued thereunder. Title to the properties and other assets of which possession has been taken remains in the owners thereof. Possession by the United States is not exclusive, and the United States asserts, and will assert, only such control over the properties in its limited possession as may be necessary to accomplish the purposes of operation and of said Executive Order.

The Federal Manager retained possession and control of the taxpayer's transportation system from August 12, 1944, until September 28, 1945. (R. 76-77). During that period the taxpayer's officers and employees operated the system under the supervision and control of the Federal Manager, and the taxpayer realized a profit of about $21,000 during the period of federal control. (R. 67, 76-77.) At the termination of federal control, the property was returned to the taxpayer. (R. 65.) After the failure of various efforts to obtain additional compensation by the taxpayer and other motor carriers whose property was placed under the control of the Government, Congress passed the Act of July 2, 1948, c. 808, 62 Stat. 1222, establishing the Motor Carrier Claims Commission, whose function it was to hear and determine existing claims against the United States arising out of the

taking of possession or control of certain motor carrier transportation systems. (R. 77-80.)

The taxpayer filed a claim for about $196,000 (R. 80), and in 1952 the Commission awarded the taxpayer about $23,000, plus interest in the amount of approximately $6,000. (R. 81-86.) The taxpayer having failed to report any of the award as income in 1952, the Commissioner asserted a deficiency on the ground that the sum of about $29,000, representing the award plus interest, represented ordinary income in 1952. (R. 85-86.) The taxpayer contested the deficiency in the Tax Court on the ground that the income represented by the award did not accrue in 1952, and, secondly, that the sum in question was taxable as capital gain. (R. 2.) The Tax Court decided that the award by the Motor Carrier Claims Commission did not accrue until 1952 when the Commission's decision was handed down (R. 92), and that the award was ordinary income under Section 22(a) of the Internal Revenue Code of 1939 because it was paid as a substitute for rent (R. 98). On appeal, the Court of Appeals for the Eighth Circuit affirmed the decision of the Tax Court (Pet. 27-40), holding that there was no conversion of capital assets within the meaning of Section 117(j) of the 1939 Code. (Pet. 39.)

ARGUMENT

The decision of the court below is correct. Section 117(j)(2) of the Internal Revenue Code of 1939, *supra*, pp. 3-4, provides in part, and in certain circumstances, that gains from the compulsory or involuntary conversion (as a result of destruction in whole

or in part, theft or seizure, or an exercise of the power of requisition or condemnation) of property used in the trade or business shall be treated as gains from the sale or exchange of capital assets. Both the Tax Court and the Court of Appeals held that the possession and control of the taxpayer's motor transportation system by the United States during World War II was not a conversion within the meaning of the statute because it was not a permanent taking, but merely a taking for a temporary use. That there is a valid distinction between a permanent taking and a taking for a temporary use is apparently conceded by the taxpayer (Pet. 13-14), and is shown by the difference between the respective measures of compensation in the two cases. In the former case the measure of compensation is the fair market value of the property, whereas in the latter it is the market rental value. See *United States* v. *General Motors Corp.*, 323 U. S. 373; *United States* v. *Petty Motor Co.*, 327 U.S. 372; *Kimball Laundry Co.* v. *United States*, 338 U.S. 1. While the permanent taking of property by the Government is undoubtedly a conversion within the meaning of the statute, the taking for a temporary use does not fall within the language of the statute because the property is returned to the private owner after the emergency. The facts of the present case clearly establish that the taking was for a temporary use.

Executive Order No. 9462, dated August 11, 1944, authorizing the Director of the Office of Defense Transportation to take possession and control of certain motor carrier transportation systems, including that of the taxpayer, was issued during World

War II to prevent the threatened interruption of that service as the result of a labor disturbance. (R. 52-54, 75.) The taxpayer and the other carriers were directed on the same day, August 11, 1944, to resume operations in the usual manner, with the help of their officers and employees; title to the properties was to remain in the owners; and the United States was to assert only such control over the properties as might be necessary to accomplish the purpose of operation. (R. 76.) On September 28, 1945, the control of the United States over the taxpayer's transportation system was terminated, at which time the possession and control of its properties by the Government was relinquished. (R. 65.) During the period of federal control, the taxpayer's system earned a profit of about $21,000, which it was permitted to retain. (R. 67.) The Motor Carrier Claims Commission determined in 1952 that the taxpayer was entitled to an additional sum of $29,000 [3] as compensation for the use of its property during the period of federal control. (R. 34, 68, 81-86.) Under these circumstances, both the Tax Court and the Court of Appeals determined that the taxpayer's property was taken merely for temporary use.[4] Therefore, there

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[3] Of this sum, about $6,000 (the difference between $29,324.74 and $23,041.77 (R.85)) represents interest, which is taxable as ordinary income regardless of whether or not there was a conversion of the taxpayer's property. See *Kieselbach* v. *Commissioner*, 317 U. S. 399.

[4] See S. Rep. No. 1983, 85th Cong., 2d Sess., pp. 114-115, on the Technical Amendments Act of 1958, P.L. 85-866, 72 Stat. 1606, which states that claims for compensation made by motor carriers after World War II were settled on the basis of rental value.

was no conversion within the meaning of Section 117 (j) (2) of the 1939 Code.

There is no direct conflict of decisions. The only other case involving similar facts is in accord with the decision of the court below. *Gillette Motor Transport* v. *Commissioner*, decided March 6, 1958 (1958 P-H T.C. Memorandum Decisions, par. 58,022). The *Gillette* case is now pending on appeal to the United State Court of Appeals for the Fifth Circuit.

It may be pointed out that if the taxpayer, pursuant to Section 99 of the Technical Amendments Act of 1958, P. L. 85-866, 72 Stat. 1606, enacted on September 2, 1958, exercises an election to include the award of the Motor Carrier Claims Commission as income during the period of federal control (August 11, 1944, to September 28, 1945), the question presented in this petition will become moot. This case involves the taxable year 1952. If the taxpayer exercises this recently authorized election, the amount of the award will not be treated as income for 1952 and the question whether it would otherwise have been taxable in that year as capital gain or as ordinary income will be purely academic. The failure of the taxpayer to ask this Court to review that part of the decision of the court below which held that the amount of the award accrued as income in 1952 gives rise to the inference that the taxpayer expects to exercise the election provided by the statute to treat the award as income in 1944 and 1945.

CONCLUSION

The decision of the court below is correct, there is no conflict, and no question of general importance is presented. Accordingly, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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